BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MAZHAR H. SHAH Claimant	)	
VS.	)	Docket No. 1,002,287
CESSNA AIRCRAFT COMPANY Respondent Self-Insured	)	

ORDER

Respondent requests review of the July 8, 2003 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

ISSUES

The ALJ awarded claimant medical treatment and required respondent to furnish the names of three physicians for the selection of one by claimant for his treatment. The ALJ specifically found claimant's work for respondent aggravated his preexisting condition while doing overhead work and working in cramped spaces. Therefore, the ALJ concluded claimant's injury was found to have arisen out of and in the course of his employment with respondent. The AJ also expressly held that respondent had notice of the injuries.

The respondent requests review of this decision, arguing that claimant failed to meet his burden of proof on both the issues of notice and whether his physical complaints of pain in his right shoulder and neck and accompanying need for treatment arose out of and in the course of his employment with respondent.

Claimant argues the ALJ's findings are supported by evidence contained within the record and should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board (Board) makes the following findings of fact and conclusions of law:

In order to fully understand the Board's findings, a brief procedural history of this claim is necessary.

This is the third time this claim has been the focus of an appeal before the Board. On May 7, 2002, the ALJ issued his first preliminary hearing Order granting claimant medical treatment. [1] Respondent appealed this Order alleging claimant failed to establish his neck and right shoulder problems arose out of and in the course of his employment with respondent. Respondent also alleged claimant failed to establish notice as required by statute. [2]

On appeal, the Board examined the entire record, including claimant's testimony along with that of Doyle Almack and Larry Wayne McConnell, claimant's direct supervisors. The Board concluded, based on the record presented, as follows:

> In this matter, the evidence is contradictory between claimant and his supervisors. Claimant alleges multiple violations of his overhead work restriction, with both Mr. Almack and Mr. McConnell denying same. Claimant also testified that he suffered significant aggravations of his upper extremity problems while working for respondent, but the medical evidence in the record fails to support that. Claimant's ongoing treatment with his family physician, Dr. Crook, does not verify that claimant was suffering repetitive aggravations while at work. In fact, the medical report from Dr. Crook dated December 20, 2001, which was shortly after claimant left work on an FMLA leave, indicate that claimant felt his weight lifting activities, rather than his work for respondent, was the "aggravating factor."
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> Claimant also alleges that he talked to his supervisors regularly about the work-related nature of his symptoms. Both Mr. Almack and Mr. McConnell deny that claimant advised them of any work-related connection to these symptoms. They were, in fact, told that claimant's problems related to how he slept. Additionally, both deny claimant regularly worked overhead in violation of his restriction and both state that claimant was very specific about avoiding any type of overhead work. Claimant also advised Dr. Wilkinson at his August 7, 2001 examination that he woke up with the pain

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[1] The May 7, 2002 Order is identical in content to the Order at issue in this appeal.

[2] K.S.A. 44-520.

> in his right shoulder. He advised Dr. Wilkinson that he had suffered no known injury.
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> The Board finds, based upon this record, claimant has failed to prove that the injuries suffered to his neck and right shoulder were caused or aggravated by his employment with respondent. Therefore, claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment with respondent.
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> K.S.A. 44-520 obligates that notice of an accident be provided to respondent within ten days after the date of accident. Claimant alleges he discussed his ongoing work-related problems with both his crew chief, Mr. Almack, and the final line foreman, Mr. McConnell. Both Mr. Almack and Mr. McConnell admit to knowing that claimant had upper extremity, shoulder and neck problems. However, the information provided to them indicated that claimant's problems preexisted his employment with respondent. Both Mr. Almack and Mr. McConnell testified the first notice they were provided that claimant was alleging a work-related accident was in February 2002, after claimant's examination with Dr. Wilkinson.
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> Claimant's last day worked with respondent was December 14, 2001. The ten-day limitation placed upon claimant by K.S.A. 44-520 would have run well before the February 1, 2002 notice to respondent of the alleged accident. The Board, therefore, finds claimant has failed to prove that he provided timely notice of accident as is required by K.S.A. 44-520. [3]

The Board reversed the ALJ and the matter was returned for further proceedings based upon the parties' requests.

The claim was then the focus of a second preliminary hearing at which further evidence was presented. This testimony consisted of testimony from Jeff Hetler, an employee of respondent's who authenticated a photograph of claimant. This picture shows claimant on December 6, 2001 working in the nose cone of a plane that is being built at respondent's manufacturing facility.

There is additional testimony from Mitchell Graham, Jr., an individual who worked with claimant in the fall of 2001 but never observed claimant working with his hands and arms up above his head working on headliners. John Ralph Alexander was claimant's production foreman and he likewise testified that he never saw claimant work on any headliners.

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[3] *Shah v. Cessna Aircraft Co.*, No.1,002,287 at 4, 2002 WL 1838721 (Kan. WCAB July 31, 2002).

Daniel Pellett, who is employed as a final inspector, testified that he has seen claimant sitting in the nose cone of the aircraft while working, just as depicted in the photograph, but he's never seen claimant installing any headliners. However, Mr. Pellett admits that he approved claimant installing headliners, if necessary. Mr. Pellett also indicated that some of the work claimant would have been asked to perform could possibly have involved overhead work such as installing dampening tape or the oxygen masks. According to him, this work was at chest level to maybe overhead. At another point he says that the work was not "necessarily overhead." [4]

Mr. Pellett testified that he did not watch claimant 100 percent of the time as he was constantly moving around the plane looking for items to be completed. He also admitted that claimant told him once of his shoulder complaints but that claimant advised him that was due to an injury while employed by Ratheon.

Following this testimony, the ALJ issued a second Order stating as follows:

> The Workers Compensation Board ruled on July 31, 2002, that this claim was not compensable. This Court has no authority to reverse the decision made by the Board. All benefits are denied. [5]

Claimant appealed that Order and on June 26, 2003, the Board reversed the ALJ's determination and remanded the claim back for further proceedings. The Board acknowledged that new evidence may materially alter the basis for a prior preliminary hearing decision and that an ALJ had authority to determine the issues presented at the second preliminary hearing. [6]

The matter was summarily presented to the ALJ for yet a third time on July 8, 2003. No transcript from this proceeding was taken. On that same date, the ALJ issued an Order, identical in content to the prior Order of May 7, 2002, granting claimant medical treatment with a physician to be selected from a list of three provided by respondent.

Thus, the parties have come full circle and are back on the same issue as was presented in July of 2002. The only difference being the testimony offered during the March 25, 2003 hearing.

After considering the record as a whole, the Board is not persuaded that claimant has satisfied his burden of proof. When taken as a whole, the evidence does not

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[4] P.H. Trans. (March 25, 2003) at 23.

[5] ALJ Order (March 25, 2003).

[6] *Shah v. Cessna Aircraft Co.*, No. 1,002,287 at 2, 2003 WL 21688450 (Kan. WCAB June 26, 2003).

substantiate claimant's work caused an aggravation of what claimant concedes was a long history of shoulder and neck problems. At the first preliminary hearing, neither of claimant's co-workers indicated claimant was required to perform overhead activities while at work. In fact, they both indicate claimant was very persistent in avoiding any type of overhead activities. This is consistent with the testimony offered during the second preliminary hearing.

Although Daniel Pellett, the final inspector, seems to indicate he approved claimant performing some activities that possibly would involve overhead activities, depending on the methodology used, his testimony, when taken as a whole, is not a strong endorsement of claimant's theory of his injury. Moreover, Mr. Pellett testified he never saw claimant installing any of the headliners. For these reasons, the Board finds that claimant has failed to establish that his neck and right shoulder complaints stem from an injury and/or an aggravation that arose out of and in the course of his employment with respondent.

In addition, the Board is not persuaded that claimant provided timely notice. K.S.A. 44-520 requires notice of an accident be provided to respondent within ten days after the date of accident. Claimant alleges he discussed his ongoing work-related problems with both his co-employees and his supervisors. There was evidence at both preliminary hearings on this issue. In both hearings, the respondent's employees all consistently admit there were casual conversations about shoulder and neck complaints but each of these employees indicated that it was their understanding that these problems pre-dated claimant's employment with respondent. The only testimony regarding notice suggests that in February 2002, after claimant's examination with Dr. Wilkinson, he notified respondent of a work-related injury.

Claimant's last day worked with respondent was December 14, 2001. The ten-day limitation placed upon claimant by K.S.A. 44-520 would have run well before the February 1, 2002 notice to respondent of the alleged accident. The Board, therefore finds claimant has failed to prove that he provided timely notice of accident as is required by K.S.A. 44-520.

For the above stated reasons, the Board finds that the Order of the ALJ granting claimant medical treatment for the alleged accidental injuries should be reversed.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated July 8, 2003, is reversed.

IT IS SO ORDERED.

Dated this _____ day of November 2003.

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director